

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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CEDRIC KENNEDY,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

MEMORANDUM AND ORDER
98-CV-4253 (ILG)

GLASSER, United States District Judge

U.S. DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

★-x SEP 23 1998
mem

The petitioner, *pro se*, filed this motion under 28 U.S.C. § 2255 to vacate, set aside or correct his sentence. He bases his claim for relief upon his assertions that he was ineffectively assisted by counsel who failed to object to the breach by the government of his plea agreement; to erroneous information in his presentence report used to determine his base offense level; to the erroneous criminal history category in which he was placed. More specifically, he asserts that he was held accountable for a loss of between \$800,000 and \$1,500,000 in determining his sentence and that at sentencing, the government informed the court of specific offense characteristics in breach of their agreement not to take any position as to where within the applicable guideline range his sentence should fall.

BACKGROUND

On September 4, 1997, the petitioner pleaded guilty to Count 2 of a five count indictment which charged that he, four specifically named co-defendants and others, transported stolen automobiles in interstate commerce in violation of 18 U.S.C. § 2312. As was adverted to above, his plea was in accordance with a plea agreement to which specific references will be made hereafter. He was sentenced on February 12, 1998, to a term of imprisonment for 41 months to

be followed by a 3 year term of supervised release. He did not appeal his conviction and sentence.

DISCUSSION

The claims of ineffective assistance will be addressed seriatim.

A. Failure to Object to Breach of Plea Agreement

This claim is predicated upon paragraph 5(b) of that agreement which provides that the government will "take no position concerning where within the appropriate sentencing Guideline range, as determined by the court, the sentence should fall." That provision was breached, he claims when at sentencing the court asked the prosecutor whether he wished to be heard and he responded as follows:

Your Honor, Mr. Kennedy was part of a ring responsible for the theft of a great many cars, most of which have been shipped out of the country to Antigua or at least the Virgin Islands. This plea was entered pursuant to a plea agreement so the government cannot make a recommendation as to where the appropriate sentencing range would be. I just ask the Court to consider the number of cars and the length of time this conspiracy went on in fashioning an appropriate sentence.

Tr. of Sentence, p. 3

The prosecutor's remarks can not be construed as taking a position as to where within the Guideline range the sentence shall be imposed. In addition, paragraph 2 of that agreement provides in relevant part that "The parties agree that the court and Probation department will be advised by the Office [the U.S. Attorney's Office] of all criminal activity engaged in by the defendant, and that such information will be used to calculate the Sentencing Guidelines range." This claim is therefore clearly without merit.

- B. Erroneous Information in Presentence Report
- C. Erroneous Criminal History Category Assigned
- D. Amount of Loss Accountable For

These claims will be addressed together, raising as they do, assertions of inaccuracies in the presentence report. Those claims must necessarily be dismissed for the reason that the court does not have jurisdiction to correct the inaccuracies. United States v. Giaimo, 880 F. 2d 156 (2d Cir. 1989). The defendant in that case sought to correct claimed inaccuracies in his presentence report some months after he was sentenced in reliance upon Fed. R. Cr. P. 32. The Court held that "Rule 32, standing alone, does not give a district court jurisdiction to correct inaccuracies in a PSI report after a defendant has been sentenced." 880 f. 2d at 1563 (citations omitted).

The court is aware that this motion is not brought in reliance upon Fed. R. Cr. P. 32 but on 28 U.S.C. § 2255 claiming ineffective assistance of counsel. The teaching of Giaimo would be easily circumvented if what are essentially assertions of presentence report errors were presented in the guise of ineffective assistance of counsel.

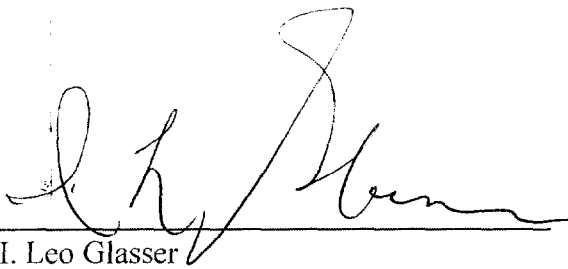
It should also be noted that the defendant agreed, by the terms of his plea agreement, that he would not file an appeal in the event that sentence imposed was within or below the Guideline range estimated in that agreement to be 46 - 57 months. As has been indicated above, the sentence imposed was 41 months arrived at by the application of U.S.S.G. § 2B1.1(b)(1)(N) triggered where the loss for which the defendant is responsible is between \$800,000 and \$1,500,000. His agreement not to appeal, entered into by him knowingly and voluntarily (transcript of Plea Proceedings at p. 14) would be readily nullified and circumvented by disguising what is essentially a foreclosed appeal by a claim of ineffective assistance.

It would be an affectation of research to once again, for the Nth time, review the teachings of Strickland v. Washington, 466 U.S. 668 (1984) regarding the pre-requisites a claimant must show to sustain an ineffective assistance claim. Suffice it to say, that such a showing could not conceivably be made.

For the foregoing reasons, this motion is denied.

SO ORDERED.

Dated: Brooklyn, New York
September 18th, 1998



I. Leo Glasser

Copies of the foregoing order were mailed to:

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